IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2459 OF 2004

Abdul Karim Abdulla ... Petitioner

versus

Smt.Asiya Khatoon Abdul

Aziz and others ... Respondents

...

Mr. V.A. Gangal, with Mr. Sampatrao A. Pawar, for the Petitioner.

Smt. Anupama B. Shah, for Respondents Nos. 1 and 2.

...

CORAM : A.M.KHANWILKAR,J.

19th August 2004

P.C.:

. Heard Counsel for the parties. Rule. Rule made returnable forthwith by consent. Smt. Shah waives notice for the Respondents. As short question is involved, petition taken up for final disposal forthwith by consent.

. This petition takes exception to the judgment and order dated January 7, 2004, passed by the City Civil Court, Greater Mumbai in Chamber Summons No. 1574 of 2003 in S.C. Suit No. 3357/1997. By the said application, the Petitioner wanted to amend the plaint by replacing his plea of easement by word ‘necessity’. The Court below has rejected the application on two counts; firstly, because such amendment was not permissible in view of the amended provisions of O. 6, r. 17, C.P.C.; and secondly, because that will change the entire nature of the suit after recording of part of evidence.

. Having perused the pleadings and the proposed amendment sought and considering the rival submissions, I have no hesitation in setting aside the impugned order and instead allowing the application preferred by the Petitioner for amendment of the plaint. The first reason, which has weighed with the trial Court clearly overlooks that the pleading in the present case was filed prior to the amendment of O. 6, r. 17, C.P.C. As such, the rigours under the amended provisions will have no application

to the present case. Insofar as the second reason recorded by the trial Court is concerned, to my mind, although the trial Court may be justified in observing that permitting the Petitioner to replace the word ‘easement’ by word ‘necessity’ in the plaint would permit the Petitioner to change his stand; however, what is overlooked is that it is always open to the plaintiff to take alternative pleas. It is not possible to take the view that plea of easement and plea of necessity is inconsistent plea as such. Viewed in this perspective, in the interest of justice, the trial Court ought to have permitted the amendment sought by the Petitioner. The argument canvassed before this Court is that the request for amendment is made by the Petitioner plaintiff only after realising that he would not succeed on the plea of easement, as that plea will be available only to the owner of the property. The fact, however, remains that whether the Petitioner is entitled for relief on the plea of necessity will have to be established by the Petitioner on merits and that plea was available to the Petitioner as alternative plea. Hence, petition allowed. The impugned order is set aside. Chamber Summons is

made absolute. Amendment to be carried out within two weeks from the date of receipt of writ of this Court by the trial Court. No order as to costs.

. Parties to act on the authenticated copy of this order.

(A.M.KHANWILKAR,J.)